

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

76-7434

United States Court of Appeals

For the Second Circuit

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs-Appellants,

against

LOUIS NIZER, DOUBLEDAY & CO., INC. and
FAWCETT PUBLICATIONS, INC.,

Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF

PHILLIPS, NIZER, BENJAMIN
KRIM & BALLON

*Attorneys for Defendant-Appellee
Louis Nizer*

40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:

GEORGE BERGER
MARTIN STEIN

SATTERLEE & STEPHENS
*Attorneys for Defendants-Appellees
Doubleday & Co., Inc. and
Fawcett Publications, Inc.*

277 Park Avenue
New York, New York 10019
(212) 826-6200

Of Counsel:

ROBERT M. CALLAGY
JAMES RITTINGER

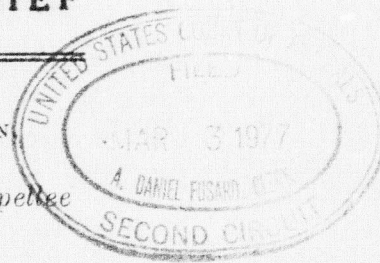


TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities.....	iii
Statement of the Issues Presented for Review.....	1
Statement of the Case.....	2
The Parties and the Context of this Appeal.....	2
Plaintiffs' Brief is Totally Misdirected.....	4
Count I - The Claim of Statutory Copyright Infringement.....	4
Count II - Libel and Invasion of Privacy.....	14
The Appropriateness of Summary Judgment.....	19
Argument	
Point I - The use by defendants of the Rosenbergs letters constituted fair use as a matter of law.....	26
a) Amount and Substantiality of Material Used.....	28
b) Purpose and Character of the Use.....	30
c) Nature of the Copyrighted Work and Whether Its Demand Has Been Reduced by Defendants' Book.....	32
Plaintiffs' Only Legal Argument Has No Merit....	33
The First Amendment Requires a Liberal Appli- cation of the Fair Use Defense.....	38
Point II The district court was correct in dismissing the claims for libel and invasion of privacy.....	41
1. The Passages in <u>The Implosion Conspiracy</u> About Which Plaintiffs Complain Are Not Defamatory.....	42

PAGE

2. The Allegedly Libelous Statements Are True.....	44
3. The Complaint Fails to State a Claim for Invasion of Privacy.....	45
4. Massachusetts Does Not Recognize a Cause of Action for Invasion of Privacy.....	52
Point III - In addition, the second count of the complaint was properly dismissed because any statements about plaintiffs are constitutionally privileged....	53
Public Figures.....	53
Actual Malice.....	60
Point IV - Count III fails to state a claim for which relief can be granted.....	68
Conclusion.....	69

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Berlin v. E. C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964)	27
Bernstein v. N.B.C., 129 F. Supp. 817 (D. D.C. 1955) <u>aff'd</u> , 232 F.2d 369 (D.C. Cir. 1956)	50
Broadway Music Corp. v. F-R Pub. Corp., 31 F. Supp. 817 (S.D.N.Y. 1940)	29
Carson v. Allied News Co. 529 F.2d 206 (7th Cir. 1976)	58,61
Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968), <u>cert. denied</u> , 393 U.S. 840 (1968)	57
Chapadeau v. Utica Observer, 38 N.Y. 2d 196 (1975)	64
Cheatum v. Wehle, 5 N.Y. 2d 585 (1959)	60
Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. C.D. 1955)	27
Conway v. Oliver, 269 Mass. 425, 169 N.E. 491 (1929)	42
Corbett v. Register Publishing Co., 33 Conn. Sup. 4 (1975)	58
Costlow v. Cusimano, 34 App. Div. 2d 196, 311 N.Y.S. 2d 192 (1st Dep't 1970)	46
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1968)	57
Dacey v. Florida Bar, Inc., 427 F.2d 1292 (5th Cir. 1970)	57
Duffy v. Kipers, 26 App. Div. 2d 127 (4th Dep't 1966)	60
Dombrowski v. Pfister, 380 U.S. 479 (1965)	21
Estate of Hemingway v. Pandom House, Inc., 53 Misc. 2d 462, 279 N.Y.S. 2d 51 (Sup. Ct. N.Y. Co.), <u>aff'd</u> , 29 App. Div. 2d 633 (1st Dep't 1967), <u>aff'd</u> , 23 N.Y. 2d 341 (1968)	63

<u>Cases</u>	<u>Page</u>
Flores v. Mosler Safe Co., 7 N.Y. 2d 276 (1959)	45
Frick v. Boyd, 350 Mass. 259, 214 N.E. 2d 460 (1966)	52
Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975)	5,37,38,47
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	53,54,55,56, 57,58,61,62
Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S. 2d 823 (2d Dep't 1964), <u>aff'd</u> , 15 N.Y. 2d 1023 (1965)	57
Golderman v. Stearns, 7 Gray 181	44
Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970)	57
Greenbie v. Noble, 151 F. Supp. 45 (S.D.N.Y. 1957)	37
Herbert v. Landau, ___ F. Supp. ___, 2 BNA Med. L. Rept. 1257 (S.D.N.Y. 1977)	58
Heywood v. Jericho Co., 193 Misc. 905, 85 N.Y.S. 2d 464 (Sup. Ct. N.Y. Co. 1948)	68
Hill v. Hayes, 18 App. Div. 2d 485, 240 N.Y.S. 2d 286 (1st Dep't 1963)	45
Hotchner v. Castillo-Puche, 404 F. Supp. 1041 (S.D.N.Y. 1975)	56,58,60
Huie v. National Broadcasting Co., 184 F. Supp. 198 (S.D.N.Y. 1960)	36
Jones v. Gates-Chili News, Inc., 78 Misc. 2d 837, 358 N.Y.S. 2d 649 (Sup. Ct. Monroe Co. 1974)	59
Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941)	27,29
Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99 (1933)	42
Koussevitzky v. Allen, Lane & Heath, Inc., 188 Misc. 479, 68 N.Y.S. 2d 779, <u>aff'd</u> 272 App. Div. 759 (1st Dep't 1947) 69 N.Y.S. 2d 432 (1947)	46,47,65

<u>Cases</u>	<u>Page</u>
Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1952)	52
Levey v. Warner Bros. Pictures, Inc., 57 F. Supp. 40 (S.D.N.Y. 1944)	50
Lloyds v. United Press International, Inc., 63 Misc. 2d 421, 311 N.Y.S. 2d 373 (Sup. Ct. N.Y. Co. 1970)	57
Lyman v. New England Newspaper Publishing Co., 286 Mass. 258, 190 N.E. 542 (1934)	42
Marvin Worth Productions v. Superior Films Corp., 319 F. Supp. 1269 (S.D.N.Y. 1970)	28
Mathews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943)	27
Meeropol v. Nizer, 505 F.2d 232 (2d Cir. 1974)	3,7,41,47
Mencher v. Chesley, 297 N.Y. 94 (1947)	15,42
Miller v. National Broadcasting Co., 157 F. Supp. 240 (D. Del. 1957)	50
Miller v. News Syndicate Co., 445 F.2d 356 (2d Cir. 1971)	21
Negri v. Schering Corporation, 333 F. Supp. 101 (S.D.N.Y. 1971)	50
New York Times v. Sullivan, 376 U.S. 254 (1964)	61
Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930)	27
Oxford Book Co. v. College Entrance Book Co., 98 F.2d 688 (2d Cir. 1938)	36
Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), <u>cert. denied</u> , 388 U.S. 909 (1967)	57
Pfaulder v. Pfaulder Co., 114 Misc. 477, 187 N.Y. Supp. 725 (Sup. Ct. Monroe Co. 1920)	50

CasesPage

Pike v. Van Wormer, 5 How. Pr. 171 (1850)	44
Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902). .	45
Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 294 N.Y.S. 2d 122 (Sup. Ct. N.Y. Co.), <u>aff'd</u> , 32 App. Div. 2d 892 (1st Dep't 1963).	46
Rosemont Enterprises, Inc. v. Random House, 366 F.2d 303 (2d Cir. 1966), <u>cert. denied</u> , 385 U.S. 1009 (1967).	9,26,28, 34,35,39
Rosenblatt v. Baer, 383 U.S. 75 (1966).	60
St. Amant v. Thompson, 390 U.S. 727 (1968).	62
Spahn v. Julian Messner, Inc., 21 N.Y. 2d 124 (1967). . . .	46
Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968).	28,29
Time, Inc. v. Firestone, 424 U.S. 488 (1976).	57,59
Time, Inc. v. Hill, 385 U.S. 374 (1967).	46,61
Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971)	57
Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), <u>cert. denied</u> , 392 U.S. 922 (1969).	57
Toscani v. Hersey, 271 App. Div. 445, 65 N.Y.S. 2d 814 (1st Dep't 1946)	50
Troonan v. Wood, 62 Ill. 2d 184 (1976)	58
Twenty-Five East 40th Street Restaurant Corp. v. Forbes, 30 N.Y. 2d 595 (1972)	21
United States v. Matheson, 532 F.2d 809 (2d Cir. 1976)	19,24

<u>Cases</u>	<u>Page</u>
University of Notre Dame DuLac v. Twentieth Century-Fox Film Corp., 22 App. Div. 2d 452, 256 N.Y.S. 2d 301 (1st Dep't 1965), <u>aff'd</u> , 15 N.Y. 2d 940 (1965).	47, 48, 49
Walker v. Pulitzer Publishing Co., 394 F.2d 800 (8th Cir. 1968)	57
Washington Post Co. v. Keogh, 365 F.2d 965, (D.C. Cir. 1966), <u>cert. denied</u> , 385 U.S. 1011 (1967). .	21
Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975) . . .	65
Waters v. Moore, 70 Misc. 2d 372 344 N.Y.S. 2d 428 (Sup. Ct. 1972).	49
Williams v. Hudderdige, 22 Barb. 396 (1854)	44
 <u>Statutes and Rules</u>	
17 U.S.C. §107 (1976).	28
28 U.S.C. §291	24
Rule 54(b)	24
New York Civil Rights Law §50.	14
§51.	14, 45, 48
 <u>Other Authorities</u>	
23 A.L.R. 3d 139, 246-47	37
Note, <u>Analysis of Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons</u> , 49 So. Cal. L. Rev. 1131 (1976) . .	59
Phelps and Hamilton, <u>Libel, Rights, Risks, Responsibilities</u> (MacMillan 1966) (pp. 54-55).	43
Prosser on <u>Torts</u> , p. 747, (4th ed.).	42

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
MICHAEL MEEROPOL and ROBERT MEEROPOL,

:
Docket No. 76-7434
:

Plaintiffs-Appellants,

-against-

LOUIS NIZER, DOUBLEDAY & COMPANY, INC.
and FAWCETT PUBLICATIONS, INC.,

Defendants-Appellees.
-----X

BRIEF FOR APPELLEES

Statement of the Issues Presented for Review

1. Was the District Court (Gagliardi, J.) correct, in the light of the admitted and incontestible facts in the record below, in summarily dismissing the copyright counts of the complaint and the supplemental complaint on the ground that the defense of fair use was established as a matter of law?

2. Was the District Court (Tyler, J.) correct in the light of the admitted and incontestible facts in the record below, in summarily dismissing the libel and invasion of privacy count of the complaint on any of the six grounds found to exist.

Statement of the Case

The Parties and the Context of this Appeal

Plaintiffs are the children of Julius and Ethel Rosenberg, who were convicted of a conspiracy to commit espionage and executed on June 19, 1953 (A. 2).^{*} Defendants Louis Nizer ("Nizer"), Doubleday & Co., Inc. ("Doubleday") and Fawcett Publications, Inc. ("Fawcett") are the author and publishers of the hard and soft cover editions of The Implosion Conspiracy, respectively. The Implosion Conspiracy is a book about the trial and post-conviction events of the Rosenberg-Sobell case.

The complaint contains three counts. The first count claims that The Implosion Conspiracy infringed upon a statutory copyright allegedly owned by plaintiffs in a book, Death House Letters of Julius and Ethel Rosenberg, published on June 10, 1953 by Jero Publishing Company, Inc. ("Jero") (A. 4). The second count is for alleged libel and invasion of privacy by unspecified portions of defendants' book (A. 8-12). The third count is a claim that the publication of The Implosion Conspiracy somehow

^{*}Page reference preceded by "A" are to the plaintiffs' Appendix. Defendants were not consulted with regard to the contents of the Appendix, as required by Rule 30 FRAP.

damaged the commercial value of letters of the plaintiffs' parents which had not previously been published (A. 12-13).

In 1974, plaintiffs commenced a new action in the United States District Court in Connecticut against Fawcett, the publisher of the paperback edition of The Implosion Conspiracy. That action was stayed by Judge Tyler, who also gave leave to plaintiffs to file a supplemental complaint against Fawcett (A. 651). This Court affirmed. 505 F.2d 232. In January, 1975, plaintiffs served a supplemental complaint, which substantially reiterated the counts of the original complaint (A. 55).

This appeal is from a final judgment entered on July 23, 1976 dismissing the entire complaint and supplemental complaint (A. 684). This final judgment is based upon the opinion and order of Judge Tyler dated July 31, 1974 granting summary judgment dismissing Count II of the complaint (for libel and invasion of privacy) (A. 181-204) and the opinion and order of Judge Gagliardi dated July 20, 1976 granting summary judgment dismissing Counts I and III of the complaint and supplemental complaint (for copyright infringement) and Count II of the supplemental complaint (a repetition of the libel and invasion of privacy claims already dismissed) (A. 650-83).

Plaintiffs' Brief is Totally Misdirected

There is one glaring and basic fault which permeates plaintiffs' entire brief and thereby renders its legal arguments invalid. It simply bears little or no relationship to the instant case. Thus, for example, there is no point to plaintiffs' twenty-four page discourse on the law of first amendment privilege as it affects an action for defamation (Brief, pp. 67-109), when plaintiffs do not even challenge Judge Tyler's threshold holding that:

"The statements [concerning the plaintiffs] were neither false nor defamatory" (A. 194).

Accordingly, this brief's principal response will be to correct the plaintiffs' hopelessly flawed statement of facts. The section of this brief dealing with the applicable authorities will be addressed to the true facts.

Count I - The Claim of Statutory Copyright Infringement

In this count, the plaintiffs contend that The Implosion Conspiracy infringes on the statutory copyright in the Death House Letters of Julius and Ethel Rosenberg ("Death House Letters"). The District Court dismissed this count on the ground that the defense of fair use had been

established as a matter of law*. As will be shown, the admitted and incontrovertible facts required that result.

Apart from a brief history of the Rosenberg-Sobell case, Death House Letters, which contains approximately 81,000 words (A. 216), consists almost entirely of a collection of letters written by Julius and Ethel Rosenberg between 1950 and March 1953 (Exhibit B to Complaint, A. 80).

*Contrary to the statements contained in appellants' brief (pp. 5, 26) the defendants' affirmative defenses other than fair use did not "disappear" from the case following Judge Tyler's denial of plaintiffs' motion for a temporary injunction. Indeed, much of the defendants' discovery, including their interrogatories and the deposition of James Aronson, the former editor of the National Guardian, were primarily for the purpose of establishing these other defenses. Thus, it has now become obvious that plaintiffs could never have established that they are the owners of the statutory copyright to Death House Letters, a sine qua non to their claim to statutory copyright protection. See, Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975). Since Ethel and Julius Rosenberg were named in the copyright application (A. 18) as the authors of that work, Jero could have copyrighted the book only as the assignee of the common law copyright in the correspondence in question. Consistent with that theory, the complaint alleges that such an assignment was made by the Rosenbergs during their lifetime (A. 2-3). However, in their further answers to interrogatories, plaintiffs admitted that the alleged assignment was oral and that the only persons present at the time of the alleged assignment were "Julius Rosenberg, Ethel Rosenberg, and Emanuel H. Bloch, all of whom are dead" (A. 843). Consequently, plaintiffs could not have proven the "assignment" at trial.

Death House Letters had concededly been out of print for almost twenty years prior to the publication of The Implosion Conspiracy (A. 99) and no sales of Death House Letters have taken place since June 30, 1956 (A. 222).

Jero was formally dissolved in January, 1957 (A. 219-220), and its financial records establish that between 1953 and 1956, the gross income from sales of the book was only \$12,000 (A. 220-21).

The Implosion Conspiracy, on the other hand, is essentially an account of the "trial and post-conviction legal proceedings" of the Rosenberg-Sobell case (A. 98). The book contains approximately 228,900 words (A. 216). In the introduction, the author states that the book's purpose would be to answer the question, "Do you think there was sufficient evidence warranting the jury, which sized up the witnesses, to decide that the Rosenbergs were guilty?" (A. 80, p. 9), a question the author answered in the affirmative at the end of the book (A. 80, p. 486).

In order to present the post-conviction period in historical perspective, Mr. Nizer quoted brief excerpts from 28 of the letters appearing in Death House Letters (A. 513). The Rosenbergs wrote these letters to each other and to the outside world when they were under sentence of death. As Judge Tyler observed:

"As I read The Implosion Conspiracy the quotations were used with discretion and with demonstrable purpose to illustrate from an historical and legal point of view, the post-conviction appeals and petitions for clemency which were filed by and for Mr. and Mrs. Rosenberg. The relevant portions of the book almost certainly will provide reasonably valuable source material for future historians, biographers and social scientists." (A. 106-07)

* * *

"Thus, defendants are likely to prove that their book is a serious, full and readable account of what was a trial of great historical interest; that resort to quotations of certain of the Rosenberg letters is important to any serious book on this trial..." (A. 107), (quoted with approval in Meeropol v. Nizer, 505 F.2d 232, 237 [2d Cir. 1974])*

The importance of the letters to any book about the Rosenberg case was confirmed by plaintiffs themselves, who wrote in their own book, We Are Your Sons (A. 526), "Our parents came to realize that their correspondence could be utilized as aids in the campaign to save them" (p. XII) (A. 515). Indeed, plaintiffs now candidly concede that:

"Uncontroverted evidence demonstrated that Ethel and Julius Rosenberg intended the letters for publication..." (Brief p. 49)

*Indeed, even Walter and Miriam Schneir's book, Invitation To An Inquest, which defendants maintain is the definitive work (A. 263), has a lengthy section quoting excerpts from Death House Letters (Chapter 19 et seq.)

Notwithstanding their importance to "any serious book" on the Rosenberg trial, the use of the excerpts in The Implosion Conspiracy is highly incidental to the main purpose of the book. Thus, the first quoted excerpt from any such letter appears at Page 393 of The Implosion Conspiracy (A. 209-10), after the reader has finished more than eighty percent of the book*. The total amount of the material quoted consisted of 1,957 words** (A. 681). Thus, the material quoted by defendants comprised approximately .0085 of the 228,900 words in The Implosion Conspiracy and .024 of the 80,000 words in Death House Letters (A. 657). As Judge Gagliardi found, the use of the letters was both "qualitatively" and "quantitatively" insubstantial (A. 678; See also A. 100).

*Plaintiffs' statement that the excerpts of the letters appear in "the last 125 pages" of The Implosion Conspiracy (Br. p. 15) is demonstrably false. The fact is that all of the challenged excerpts appear on parts of seventeen pages, between pages 393 and 439 of defendants' book (A. 210).

**Actually, the total is only 1,846 words, as defendants in preparing the motion had overlooked the fact that 111 words of the quotation appearing on page 439 of The Implosion Conspiracy originally came from George Bernard Shaw's St. Joan, as to which plaintiffs clearly have no rights (A. 643).

On the basis of these admitted and incontrovertible facts, defendants moved for summary judgment dismissing the copyright counts (A. 212)*. In a desperate attempt to create an issue of material fact, plaintiffs submitted some three hundred pages of answering affidavits (A. 250-506; 553-82; 591-607). The sole thrust of these affidavits was to attempt to discredit The Implosion Conspiracy as a historical work, thereby (according to plaintiffs' theory of the law) precluding defendants from asserting the defense of fair use (A. 664). Defendants' reply papers demonstrated the legal irrelevance of plaintiffs' "factual" attack on The Implosion Conspiracy (A. 507-11).

After reviewing the elements of the defense of fair use as well as the law in this Circuit regarding summary judgment, Judge Gagliardi squarely rejected plaintiffs' legal premise that The Implosion Conspiracy was not entitled to the defense of fair use. Citing to this Court's decision in Rosemont Enterprises, Inc. v. Random House, 366 F.2d 303 (2d Cir. 1966), cert. denied,

*Although plaintiffs correctly observe (Brief p. 22) that Judge Pollack (who had been assigned to this case briefly after Judge Tyler resigned) had initially denied the motion for summary judgment without prejudice, they fail to advise this Court that he subsequently granted defendants' motion for reargument, restored the motion for hearing and directed plaintiffs to respond on the merits (A. 640). The motion was then reassigned to Judge Gagliardi who granted it.

385 U.S. 1009 (1967), Judge Gagliardi held that in order to invoke the fair use doctrine:

"Defendants' book thus need not evidence even a minimum scholarly effort or be in the form prescribed by academic historians, as plaintiffs' experts apparently believe. Rather all that need be shown is that there be some serious attempt to describe a historical event which could be of some benefit to the public at large. Whether the work here meets this minimal legal standard is a question of law which must be determined by the court primarily on the basis of an examination of the work itself." (A. 665-66)

Applying this test to The Implosion Conspiracy, Judge Gagliardi concluded:

"This court believes that, as a matter of law, a purportedly serious work by one with Nizer's reputation and experience as a trial lawyer about a famous and controversial trial is of some public benefit and thus a historical work entitled to claim the protection of the fair use doctrine."
(A. 666)*

*In fact, in order to answer the question posed in the introduction of his book (p. 9) ("Do you think there was sufficient evidence to warrant the jury...to decide that the Rosenbergs were guilty?") Mr. Nizer need only have analyzed the trial transcript and the appellate briefs and opinions, which even plaintiffs concede that he did (A. 264-65). Indeed, with respect to the answer to that question, these are the only "primary" sources. However, to put the matter to rest once and for all, Mr. Nizer did considerable research. Thus, in addition to the trial and appellate briefs and decisions, he read: The Rosenberg Story by Virginia Gardner; It's All News To Me by Bob Considine; The Book of Daniel by E.L. Doctorow; The Judgment of Julius and Ethel Rosenberg by John Wexley; The Rosenberg Letters (Dennis Dobson, London); The Betrayers by Jonathon Root and Was Justice Done? by Malcolm P. Sharp, as well as numerous newspaper reports,
(cont'd on next page)

Judge Gagliardi then went on to determine the applicability of the fair use defense to the facts of this case based on the following composite two-pronged test:

"(1) Whether the taking is limited in scope, and (2) whether in the context of the entire work it appears that the purpose of using the letters is to illustrate historical facts with which the work deals rather than to capitalize on the unique intellectual product of the person who wrote them" (A. 675).

He found that The Implosion Conspiracy passed that test beyond all doubt:

"The scope of the use of copyrighted material by the defendants is relatively limited, and the purpose of the use of the letters does not appear to be to capitalize on the unique intellectual product of the authors" (A. 678).

* * *

(cont'd from previous page)
commentaries, articles and editorials about the case (A. 521). He also interviewed Gloria Agrin Josephson, an attorney associated with the defense, Rabbi Koslowe, the prison chaplain, Bob Considine, who was present at the execution and Justice James B. M. McNally, who presided at a custody hearing involving the plaintiffs. (A. 520; See Acknowledgment page of The Implosion Conspiracy). Plaintiffs themselves credit Mr. Nizer with consulting thirteen sources (A. 263-64). Plaintiffs criticize Mr. Nizer for relying upon The Book of Daniel, supra, because it is allegedly a work of fiction (A. 264). However, it is apparent that one of plaintiffs' own experts, Alvin H. Goldstein, in producing a film and book, The Unquiet Death of Julius and Ethel Rosenberg, also relied upon the same book (A. 408).

"Rather than being used to exploit individual feelings or expressions of plaintiffs' parents, the excerpts from the letters, like the trial transcript and other source materials, are used to relate certain facts relative to the whole event. These letters in themselves are part of the historical record" (A. 679)

* * *

"Here, whatever their literary quality, the letters are clearly used by the defendants to describe the feelings and thoughts of two of the major participants in the Rosenberg trial. Unlike the material used in Folsom v. Marsh, it cannot be said that defendants' work derives a significant part of its value from the use of the copyrighted letters. Defendants' work deals largely with the trial and legal proceedings following the trial prior to the Rosenbergs' execution. While the impact of the trial and conviction on the relationship between Julius and Ethel Rosenberg is undoubtedly a minor theme in the book, the limited use of the letters in the latter sections is not, in this court's view, quantitatively or qualitatively substantial in the context of the entire work. Nor is the copied material qualitatively or quantitatively substantial in the context of the copyrighted work. Undoubtedly, the qualitative impact of copyrighted passages is a matter that to some extent turns on individual subjective judgment. Nevertheless, the undisputed facts in the record in this case are so overwhelming that this court finds that a reasonable jury could not reach the conclusion that the copying here is not entitled to fair use protection." (A. 678-679).

Accordingly, the Court held "as a matter of law" that all of the defendants were entitled to summary judgment on the grounds of fair use (A. 679).

Furthermore, with respect to defendants Nizer and Doubleday -- as to whom plaintiffs had waived a jury -- Judge Gagliardi held "as the trier of the facts" that the use of the letters in The Implosion Conspiracy had been fair (A. 680)*. Although plaintiffs have completely ignored this holding, this Court cannot. The fact remains, that at least with respect to the copyright claims, this is not only an appeal from a grant of summary judgment, but also an appeal from a decision rendered after a trial on the issue of fair use, where the findings are conclusive in the absence of clear error.

*This finding was made possible by the fact that at the oral argument, Judge Gagliardi constantly requested plaintiffs to advise the Court what additional facts they would attempt to prove at the trial on the issue of fair use and even granted leave to do so in writing. The Court thereby in effect held a separate trial on the issue of fair use and permitted plaintiffs to make an offer of proof in writing of their evidence (A. 608-49). Plaintiffs submitted a supplementary affidavit of 17 pages setting forth exactly what they hoped to prove "in response to defendants' tendered defense of fair use" (A. 591). This affidavit did nothing more than reiterate contentions already made. (See letter dated May 22, 1975 from George Berger and Robert Callagy to Judge Gagliardi [not reproduced in appendix]).

Count II - Libel and Invasion of Privacy

The second count is for libel and invasion of privacy. Judge Tyler summarily dismissed this count, finding:

1. The defendants' book did not libel the plaintiffs (A. 194);
2. The passages complained of were substantially true (A. 194);
3. If libelous and not true, the plaintiffs were public figures and the record was abundantly clear that they would never be able to show the requisite malice as a matter of law (A. 189-94);
4. That the invasions of privacy complained of did not fall within the coverage of Sections 50 and 51 of the New York Civil Rights Law* (A. 195-96);
5. That the plaintiffs' names were not used in the defendants' publications (A. 197-98); and
6. That the statements complained of were so highly incidental to the main thrust of the defendants' book, that they were not within the coverage of New York's invasion of privacy statute (A. 199).

*Although Judge Tyler did not go into the issue of the Massachusetts law because the plaintiffs did not raise it, it is nevertheless clear that no such tort exists in Massachusetts, the state of plaintiffs' domicile. (See page 52 , below)

On this appeal, plaintiffs have argued only that the Court erred with respect to findings 3, 4 and 5. Therefore, even if their contentions were correct, the judgment below would still have to be affirmed because the unchallenged grounds are sufficient to support the same result. However, it is plain that plaintiffs are not correct in any aspect of their argument.

It is axiomatic that in order for a publication to be libelous, it must be susceptible to a reading which would hold the plaintiffs up to "hatred, contempt or aversion." Mencher v. Chesley, 297 N.Y. 94, 100 (1947) (Fuld, J.). Although their complaint did not set forth the allegedly objectionable passages, plaintiffs, in response to defendants' interrogatories, specified 77 passages or pages in The Implosion Conspiracy which they claimed libeled them (A. 837-38, 840, 844-53). Once plaintiffs were forced to commit themselves to specifics, however, it became evident that their claim would not survive the Mencher test.

Of these 77 specified passages, 48 contained absolutely no reference to plaintiffs at all (A. 119-20). These passages dealt with plaintiffs' parents. Plaintiffs sought to predicate a claim for libel on the alleged fact that by not presenting a complete picture of their

parents, the passages insinuated "parental rejection... through passive acceptance of execution and martyrdom" (A. 192). Judge Tyler correctly found "such arguments [to be] tortured, contrived and meritless." (id.)

Of the remaining 29 passages, 25 were either completely innocuous or indeed complimentary (A. 120, e.g. The Implosion Conspiracy, p. 492). The remaining four refer to plaintiffs' emotional state as children. Page 23 refers to Michael Meeropol's "tantrums on the street"; Page 242 refers to his "neurotic tendencies"; and pages 366-67 again refer to the plaintiffs' "neurotic behavior" (A. 121-22), which as indicated below, was admitted by the plaintiffs themselves (A. 124-26).

As demonstrated in Point II of this brief, it is not libelous to say that someone, as a child, had neurotic tendencies or displayed neurotic behavior. Moreover, any theoretical claim of defamation with respect to these passages is completely destroyed by defendants' description of the plaintiffs when they grew up as "fine young men" and "normal, decent citizens." (A. 123)*. Consequently, Judge Tyler was correct in holding that "the statements were [not]...defamatory." (A. 194).

*Ironically, this is one of the passages plaintiffs claim to be libelous (A. 120).

Furthermore, plaintiffs themselves, as well as their father Julius Rosenberg, admitted that they were neurotic as children (See A. 124-126).^{*} Accordingly, Judge Tyler properly found that:

"The statements were [not] false...."
(A. 194).

Alternatively, even if these few passages in The Implosion Conspiracy could possibly be considered libelous, plaintiffs, as a matter of law, could not have proven malice, that is, knowledge of falsity or reckless disregard thereof - the standard applicable since plaintiffs are public figures. (See pages 53-57, infra).

Many of the same considerations (as well as others) which refute the libel claim also required summary dismissal of plaintiffs' claim for invasion of privacy. Thus, for example, the 48 allegedly objectionable passages in The Implosion Conspiracy which do not refer to plaintiffs at all (See p. 15 supra) cannot possibly form the basis of a claim for invasion of privacy (A. 196-97). Moreover,

^{*}Thus, Michael Meeropol admitted in an interview in Ramparts Magazine that "I was wild out of my mind and my grandmother couldn't control me" and Dr. Frederick Worthham, his psychiatrist, "thought I was very close to being psychotic" (A. 124). Moreover, Julius Rosenberg testified at the espionage trial that his son Michael had been "very emotionally disturbed for quite a number of years" and that "he was subjected to treatment at the Jewish Board of Guardians" (A. 125-126).

the factors which rendered plaintiffs public figures with respect to the libel claim (See pages 53 - 60 , infra) supported the finding that the references to plaintiffs in The Implosion Conspiracy "concern matters properly within the orbit of public interest and scrutiny" and thus, are "constitutionally protected" (A. 196).

In addition, since it is not disputed that "nowhere" in The Implosion Conspiracy are plaintiffs "identified or referred to as Meeropol" (A. 197)* an action for invasion of privacy will not lie under the New York Civil Rights Law. (See Point II infra).

Finally, plaintiffs' contention (Brief p. 20) that they were not afforded an opportunity to file affidavits in opposition to the first motion for summary judgment is completely false. The facts were correctly summarized by Judge Tyler as follows:

"Defendants' motion for summary judgment on count II of the complaint was originally scheduled for February 15, 1974. Plaintiffs were served with the motion on January 30, 1974 and with defendants' memorandum of law in support of their motion for summary judgment on January 31. After an adjournment was granted pursuant to the request of plaintiffs, an additional request by

*Although he was told of their adopted names, Mr. Nizer "chose not to identify" plaintiffs by those names in order to preserve their anonymity, (A. 131), which they themselves chose to abandon and then complain about (A. 198-99).

plaintiffs for an adjournment of the motion to April 5 was denied and oral argument was held on March 1. The court directed the parties to submit briefs, affidavits and statements pursuant to General Rule 9(g) of this court. Plaintiffs' brief in opposition to the motion was filed on March 18, 1974 and the 9(g) statement was filed on April 11, 1974. The affidavit accompanying plaintiffs' brief in opposition was submitted by the plaintiffs' attorney. Indeed, the procedural history of this case is replete with attempts by plaintiffs' counsel to obfuscate the issues and to delay the progress of the case" (A. 202-03)

Plaintiffs had seventy days between January 30th and April 11th to submit an answering affidavit on the merits. They chose not to do so for the self-evident reason that no affidavit could have met any of the legal arguments advanced on the motion. Now they seek to predicate an argument based upon their own default.

The Appropriateness of Summary Judgment

The test to be applied in determining the propriety of summary judgment was recently set forth by this Court in United States v. Matheson, 532 F.2d 809, 813 (2d Cir. 1976) as follows:

"However, it is equally true that summary judgment should not be denied where the only issues raised are frivolous and immaterial ones which would simply serve to provide an exercise in futility or a purposeless trial for the district court, particularly where no jury has been demanded. See Beal v. Lindsay, 468 F.2d 287, 292, (2d Cir. 1972); Houghton Mifflin Co. v. Stackpole Sons, Inc., 113 F.2d 627, 628 (2d Cir.), cert. denied, 308 U.S. 597 (1940)" (A. 662)

Defendants submit that this Court would be hard pressed to find a case where summary judgment was more appropriate than this one. Contrary to plaintiffs' contention, there are simply no issues to be tried with respect to the defense of fair use. As Judge Gagliardi correctly observed:

"Plaintiffs here argue that there are significant factual issues for trial, but a careful examination of the record before this court indicates a skillful attempt by plaintiffs to manufacture factual issues for trial where in reality none exist. The issues as to which plaintiffs claim there are factual questions in this case are either not in dispute or are such that even if resolved in plaintiffs' favor the ultimate decision on the fair use question would not be affected." (A. 663-664)

Thus, the excerpts used are not in dispute (pp. 6-8, supra); the purpose of the use of the excerpts and their qualitative significance can be ascertained only by reading The Implosion Conspiracy (and that does not require a trial); and all of plaintiffs' affidavits attacking the scholarship of The Implosion Conspiracy are legally irrelevant.

Similarly, with respect to the libel and privacy claims, a trial could not change the fact that none of the 77 passages in The Implosion Conspiracy to which plaintiffs object is either libelous or false. Nor, for that matter, would a trial alter the fact that the passages relied upon are not within the protection of the statutory right of

privacy, or that the name Meeropol is not mentioned once in The Implosion Conspiracy (See p. 14 supra).

Furthermore, because of the nature of the claims asserted, First Amendment considerations militate in favor of summary judgment. As Judge Tyler observed:

"Summary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest and concern. In recognition of the constitutional privilege of free expression secured by the First and Fourteenth Amendments, the courts in libel actions have recognized the need for affording summary relief to defendants in order to avoid the "chilling effect" on freedom of speech and press. (A. 185)*

Finally, and quite apart from considerations involving either the merits of this action or the First Amendment, this action should be finally brought to a halt. As this Court has already noted, plaintiffs, during the course of these proceedings have been "seeking to retry or exploit issues of the Rosenberg case rather than direct [themselves] to the issues." (unreported opinion of this Court on plaintiffs' motion to transfer this appeal to another Circuit, November 23, 1976, p. 4) That desire was manifested from the outset of this litigation.

*Dombrowski v. Pfister, 380 U.S. 479, 487 (1965); Miller v. News Syndicate Co., 445 F.2d 356 (2d Cir. 1971); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967); Twenty-five East 40th Street Restaurant Corp. v. Forbes, 30 N.Y.2d 595 (1972).

The defendants' book was first published in February, 1973 (A. 98). Pre-publication publicity began in May, 1972 (A. 98). The plaintiffs waited until June 19, 1973, the twentieth anniversary of the execution of their parents, to commence this action with a motion for a temporary injunction (A. I), thereby insuring maximum press coverage. Simultaneously therewith, the plaintiffs unleashed a torrent of press releases and interviews, thereby using this action as a launching pad for their campaign to overturn the conviction of their parents (See the press clippings attached as exhibits 2-96 to the affidavit of George Berger, sworn to October 9, 1974*; See also, A. 133).

Because this action was brought by plaintiffs to secure political rather than legal relief, it was in plaintiffs' best interest to keep this action pending indefinitely, and forever if possible. Their conduct throughout this litigation indicates that this is exactly what plaintiffs have in mind. When Judge Tyler denied the motion for a temporary injunction in an opinion which left little room for doubt that he saw no merit in their claims (361 F. Supp. 1063), plaintiffs seized upon the occasion of the publication of the paperback edition of

*Document 85(a) in Record on Appeal

The Implosion Conspiracy to sue Fawcett in Connecticut in an effort to find a more sympathetic forum and to keep the case going (A. 651).

Defendants could triple the length of this brief by a recital of the various steps and proceedings brought about by the plaintiffs' desire to keep this action in the public eye. As Judge Tyler observed more than two and one half years ago:

[T]he procedural history of this case is replete with attempts by plaintiffs' counsel to obfuscate the issues and to delay the progress of this case." (A. 203)

Thus, this case has already been the subject of at least nineteen decisions by the District Court (including seven written opinions and twelve memorandum endorsements*), eight applications to and/or decisions by this Court,** and

*Five of the District Court opinions (July 19, 1973; April 3, 1974; June 28, 1974; July 2, 1974; October 29, 1974) are listed and described at pages I, IV, V and VI of the docket entries. The remaining two opinions are the opinions of Judge Tyler (A. 181-204) and Gagliardi (A. 650-683) dismissing plaintiffs' claims. The endorsements may be found on pages I, V, VI and VII of the docket entries.

**Plaintiffs have appealed to this Court from (1) the denial of their motion for a preliminary injunction (A. I) (which appeal was later withdrawn), (2) the order granting defendants' motion for summary judgment dismissing the claims for libel and invasion of privacy (A. V) (which appeal was dismissed), (3) the order staying their action against Fawcett. (505 F.2d 232). In addition, they (4)
(cont. on next page)

one decision by the United States Supreme Court.*
Plaintiffs have yet to prevail on a single substantive ruling.

If this action is remanded for trial, the Court and defendants can only expect more of the same. Thus, in responding to Judge Pollack's inquiry as to additional discovery required by plaintiffs (when this matter was assigned to him), plaintiffs announced their intention to take depositions in Ghana, France and England, aside from continuing the depositions of defendants Nizer (who has already been deposed on four separate occasions) and Doubleday (which had been deposed twice) (Brief pp. 21,22).

Finally, it is equally clear that plaintiffs' plan would make the trial of this action "an exercise in futility" (United States v. Matheson, supra, p. 19). As Judge Gagliardi recognized, plaintiffs' purpose is to prove that their parents were innocent and not any alleged copyright infringement:

(cont. from previous page)
sought a writ of mandamus to require Judge Tyler to issue a certificate pursuant to Rule 54(b). (508 F.2d 837). Finally, in connection with this appeal (5) they have sought (6) to transfer the appeal to another Circuit (7) a stay of the scheduling order, and (8) leave to file a 110 page brief.

*On January 18, 1977, Mr. Justice Thurgood Marshall denied plaintiffs' application for a Certificate of Necessity pursuant to 28 U.S.C. §291.

"Through the testimony of these purported experts, plaintiffs claim that at trial they will be able to show that the defendants' book is not a historical work and thus is not entitled to the protection of the fair use doctrine....Plaintiffs' voluminous and vehement submission on this point gives the distinct impression that what is really desired is a trial of the accuracy and fairness of defendants' book and its implicit conclusion that the controversial Rosenberg trial was fair -- an issue on which history alone must provide the final judgment." (A. 664) (See also the unreported decision of this Court dated November 13, 1976 and quoted on p. 21, supra)

Defendants had nothing to do with the original trial and conviction of Julius and Ethel Rosenberg. Nevertheless, during the past three and one half years they have been forced to expend huge amounts of time and money to defend themselves in a lawsuit in which they are merely the vehicle for plaintiffs' crusade to vindicate their parents. The time has come to call a halt to these proceedings. After more than two dozen decisions, both plaintiffs (and their parents) have had more than their day in Court.

Point I

THE USE OF DEFENDANTS BY THE
ROSENBERG LETTERS CONSTITUTED
FAIR USE AS A MATTER OF LAW

The touchstone for any discussion of fair use is the leading case of Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967). There, this Court adopted the definition of fair use framed by Ball:

" 'Fair use' is a 'privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner * * *' Ball, Copyright and Literary Property 260 (1944)."

It also explained the "justification" of the defense of fair use as follows:

"The fundamental justification for the privilege [of fair use] lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts.' U.S. Const. art. 1, §8. (citations omitted). To serve that purpose courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry'." (id. at 307)

The Court then stated:

"[T]he arts and sciences should be defined in their broadest terms..." (Id.)

Consistent with the principle that the defense of fair use is coextensive with copyright protection itself, the Courts have upheld this defense in connection with a wide variety of works, including magazine articles which reprinted copyrighted songs (Karll v. Curtis Publishing Co., 39 F. Supp. 836 [E.D. Wis. 1941]), a television burlesque of a copyrighted film (Columbia Pictures Co. v. National Broadcasting Corp., 137 F. Supp. 348 [S.D. Cal. C.D. 1955]), a film based on a successful copyrighted play (Nichols v. Universal Pictures, 45 F.2d 119 [2d Cir. 1930]), parodies of hit copyrighted songs (Berlin v. F.C. Publications, Inc., 329 F.2d 541 [2d Cir. 1964]), and even advertising catalogues which utilized previously copyrighted illustrations (Mathews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 [6th Cir. 1943]).

In determining whether the defense of fair use is applicable in a given case, the Courts have generally focused on the following three factors:

(a) the amount and substantiality of the material used;

(b) the purpose and character of the use, i.e., in the case of historical or biographical works whether

distribution of the material serves the public interest in the free dissemination of information; and

(c) the nature of the copyrighted work and whether the copying reduces the demand for the copyrighted material. See e.g., Rosemont Enterprises, Inc. v. Random House, Inc. supra; Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968); Marvin Worth Productions v. Superior Films Corp., 319 F. Supp. 1269 (S.D.N.Y. 1970); cf., 17 U.S.C. §107 (1976)*. When measured by these criteria, it is indisputable that the limited utilization of excerpts from the Death House Letters in The Implosion Conspiracy falls squarely within the defense of fair use as a matter of law.

a) Amount and Substantiality of Material Used

It is undisputed that the material copied constitutes less than .024 of the Death House Letters and .0085 of The

*These factors are virtually identical with the criteria quoted by plaintiffs on page 36 of their brief from the new Copyright Revision Act. The only difference is that the new statute divides our category (c) into two separate factors. The references by plaintiffs to Professor Crossland's nine criteria and their contention that the Court below considered eight factors (Brief, pp. 36-37) are only differences in nomenclature. The identical elements are all covered in the following discussion.

Implosion Conspiracy (p. 9 supra). No trial will increase these percentages.

In a number of cases the Courts have granted defendants summary judgment on the grounds of fair use where the material copied was far greater from both a quantitative and qualitative standpoint than that involved here. Thus, in both Broadway Music Corp. v. F-R Pub. Corp., 31 F. Supp. 817 (S.D.N.Y. 1940) and Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941), the Courts dismissed without trial, actions for copyright infringement where the defendants had used the entire chorus of songs in magazine articles. Clearly, in both cases the lyrics quoted in defendants' works amounted to many times more than .024 of the original copyrighted songs. Indeed, in Broadway Music Corp., fifty percent of defendants' article was devoted to copying the song.

More recently, summary judgment was granted on the grounds of fair use in Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968), a case arising out of the use by the defendant of the copyrighted Zapruder film of the assassination of President Kennedy. There, the copyrighted film was the basis of the author's theory of the assassination and consequently, of much greater qualitative importance to his book than the letters of the Rosenbergs

were to The Implosion Conspiracy. In each of these decisions, the Court determined the qualitative importance by itself from the two works themselves.* In light of these decisions, the minimal and incidental use of excerpts from Death House Letters and The Implosion Conspiracy falls well within the boundaries of this criterion of the fair use doctrine.

b) Purpose and Character of the Use

Confirming a conclusion reached by Judge Tyler (p. 7, supra) and quoted with approval by this Court (id.), Judge Gagliardi found that the excerpts from the letters "like the trial transcript" were used by Mr. Nizer "to relate certain facts relative" to the Rosenberg case and

*As Judge Gagliardi noted, there might well be cases in which the material taken would involve scientific or technical materials, where the Court might need testimony to assist it in its qualitative determination. Clearly, this case, involving as it does a book about a famous trial, is singularly appropriate for the Court to judge the qualitative issue without "expert" assistance. (A. 669-70).

not "to exploit individual feelings or expressions of plaintiffs' parents" (p. 12, supra). The fact is, as Judge Gagliardi found, the purpose and character of the use of the copyrighted material in the defendants' book can only be determined by a reading of The Implosion Conspiracy (A. 670).^{*} And, for the purpose of that determination it makes no difference whether the book is read at trial or on a motion for summary judgment.

In view of the determination by Judges Tyler and Gagliardi that the letters themselves are "important to any serious book about the Rosenberg case", plaintiffs' contention (Br. p. 52) that the excerpts involved need not have been copied verbatim is frivolous. Obviously, any significance that the letters have as historical facts is only established by quoting from them. And, if the quotations meet the other tests of fair use, the original author cannot be heard to complain that his work was quoted rather than paraphrased or summarized.

^{*}Again, whether in some other case, the Court would conceivably need to go outside of the allegedly infringing book to determine this factor need not be debated here. The use of the brief excerpts of the letters in the few pages of defendants' book does not present such a philosophic question.

c) Nature of the Copyrighted Work and Whether Its Demand Has Been Reduced by Defendants' Book

Although both Death House Letters and The Implosion Conspiracy deal with Julius and Ethel Rosenberg, the resemblance ends there. Death House Letters is essentially a compilation of letters written by the Rosenbergs while The Implosion Conspiracy is essentially a study of the trial itself, the post-conviction appeals, the petitions for executive clemency and the Rosenbergs' ultimate execution. No one interested in reading the published correspondence of the Rosenbergs would purchase The Implosion Conspiracy.

Moreover, as Judge Tyler found, "the parties agree that Death House Letters has been out of publication for almost twenty years" (A. 99) and,

"there is absolutely no suggestion, let alone proof, that the publication of The Implosion Conspiracy has lessened the value of the letters of Julius and Ethel Rosenberg. Practically speaking, the only realistic inferences are to the contrary, i.e., that the defendants' book probably has been the only significant event that might enhance their value."
(A. 111)*

*The truth of this last statement was confirmed by plaintiffs' subsequent publication of We Are Your Sons, a book which contains several hundred letters. Plaintiffs asserted that The Implosion Conspiracy was their justification for writing that book (pp. xi-xii).

Furthermore, as Judge Gagliardi found:

"Plaintiffs have yet to come forward with one iota of evidence indicating that The Implosion Conspiracy has in any way damaged the market for the Rosenberg letters...." (A. 667)

Judge Gagliardi, however, even in the absence of evidence "assumed" that the defendants' book may have diminished the value of plaintiffs' copyrighted letters (A. 667). This assumption, it is submitted, was, in light of the one-sided record on this issue, an act of pure charity. However, he then held:

"While the impairment of the commercial value of the copyrighted work is a factor to be considered, a copying may be sufficiently limited or otherwise privileged so as to be entitled to fair use protection." (A. 667)

Plaintiffs' Only Legal Argument Has No Merit

All of the criteria for the fair use defense were, therefore, satisfied beyond all doubt. In an effort to create any issue of fact so as to justify a trial, plaintiffs have attempted to discredit The Implosion Conspiracy as a biographical and historical work (Br. 11-14, 38-45, 51-52). Plaintiffs claim that The Implosion Conspiracy was neither scholarly nor well researched, that

it contained fictionalized conversations as well as errors of fact and, therefore, it was not entitled to the defense of fair use. Since the contention was erroneous as a matter of law (vide infra), the affidavits offered in support of that theory were all irrelevant to the motion for summary judgment.

Plaintiffs can point to no authority which refused to uphold the defense of fair use on the ground of fictional or inaccurate context. All of the decisions are to the contrary. They are supported not only by the case law but by logic as well, since there has never been a work of non-fiction that was not criticized for similar reasons. No historical work could survive the necessity to prove every part pieced together from past research, since historical writing is based upon the author's discovering, expounding and interpreting earlier records and recollections. Ultimate truth, in an absolute sense, can rarely be achieved. Consequently, the plaintiffs' contention would, in effect, read the defense of fair use out of the law. The fact is, that the defense of fair use has as broad an application as copyright protection itself (p. 26 , supra), that the copyright laws protect works which are not scholarly, contain errors, reconstruct undocumented and incidental conversations, and are even completely fictitious. The defense of fair use does likewise. The authorities, including Rosemont, have so held.

In Rosemont, the owner of a copyright to a series of articles entitled "The Howard Hughes Story" sued the author and publisher of a subsequent biography of Howard Hughes, for copyright infringement. The District Court, echoing plaintiffs' argument, described defendant's book as follows:

"The 'lively, fast-moving' Random House biography is an account of an interesting current personality designed for the popular market. It can scarcely be said to be a scholarly, scientific or educational work...." * * *

"It appears that Random's budget for the book did not provide any substantial funds for research and that it did not expect very much research to be done." (256 F. Supp. at 66, 64).

This Court, however, held that the defense of fair use was available even though defendant's book was "not a profound work." (366 F.2d at 307). It rejected the plaintiffs' argument herein that the defense of fair use was dependent on a showing that defendant had done independent research*:

"We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. Cf. Oxford Book Co. v. College Entrance Book Co., 98 F.2d 688 (2d Cir. 1938). It is just such wasted effort that the prescription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use are designed to prevent" (Id. at 310).

*Although legally irrelevant, the sur-reply affidavit of Marshall Perlin credits defendant Nizer with consulting at least thirteen sources (A. 263-64), thereby conceding substantial research.

Nor is there any requirement that a historical or biographical work contain footnotes, an index or a bibliography, as plaintiffs would have this Court believe (A. 263). Thus, several books on the Rosenberg case, including Virginia Gardner's The Rosenberg Story; Malcolm Sharp's Was Justice Done?; S.A. Fineberg's The Rosenberg Case; and even Morton Sobell's On Doing Time, lack these so-called indicia of "scholarship." Nevertheless, these books (with the exception of Sobell's) were all listed in the bibliography of one of plaintiffs' alleged experts in preparing his own study of the case (A. 408).

Similarly, the Courts have consistently held that the existence of errors in the allegedly infringing work has no bearing on the defense of fair use. For example, in Oxford Book Co. v. College Entrance Book Co., 98 F.2d 688 (2d Cir. 1938), a case involving history text books, and in Huie v. National Broadcasting Co., 184 F. Supp. 198 (S.D.N.Y. 1960), which involved a television biography, the Courts held that the defense of fair use was applicable despite the fact that in each case both the original copyrighted work and the allegedly infringing work contained

factual errors.*

Even a completely fictitious work based on historical characters is entitled to the protection of the fair use defense. In Greenbie v. Noble, 151 F. Supp. 45 (S.D.N.Y. 1957), plaintiff, the author of a biography of Ella Anna Carroll entitled My Dear Lady, sued defendant for copyright infringement. While plaintiff's book "purported to be historically sound" (Id. at 58), defendant's book, entitled Woman With A Sword, was concededly a "fictionalized account" of the life of Ms. Carroll and contained fictional characters, dialogue and events (Id. at 49-50).

It is clear from the foregoing decisions that for purposes of adjudicating the fair use defense, it is irrelevant whether or not The Implosion Conspiracy is a scholarly work, has footnotes, an index or bibliography, is well-researched or contains errors or fictionalization. This conclusion is confirmed by the recent case of Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975), a case which also involved The Implosion Conspiracy.

*Both of these cases are generally considered to be "fair use" cases although neither of them expressly employed that term. See, 23 A.L.R. 3d 139, 246-47.

In Gardner, the plaintiff, author of a book entitled The Rosenberg Story, a biographical work about the Rosenbergs, sued defendants Nizer and Doubleday, alleging that The Implosion Conspiracy infringed on the statutory copyright of her book. The Court dismissed the complaint on a motion for summary judgment, relying in part on the defense of fair use. It stated:

"In addition, the doctrine of 'fair use' precludes plaintiff's recovery.... Thus, even if this Court had found the defendants had copied portions of plaintiff's book, the similarity between the works is sufficiently small to permit the defendants to successfully assert the defense of fair use." (id. at 944)

Obviously, Gardner had available to her the same arguments concerning the scholarship, research and accuracy of The Implosion Conspiracy as are urged by the plaintiffs here. Evidently, Judge Bonsal believed -- with good reason -- that no such determination was necessary to hold the fair use defense applicable, even on summary judgment. The present case should be treated no differently.

The First Amendment Requires a Liberal Application of the Fair Use Defense

In his decision, Judge Gagliardi touched upon one additional element of the application of the fair use defense to cases where the defendant's work has taken a position on a controversial historical event. He stated:

"There is also another related factor which should here be mentioned. Information about public figures and their reactions to the events of which they were a part is essential to the full and free discussion of those events by subsequent historians or anyone else who has an interest in them. To the degree that a public figure is the subject of historical research or attention, his family may have an interest in seeing him portrayed only in the most favorable light. In this kind of situation there is thus an inherent danger that members of the family of a historical figure may use a copyright on his writings as a means of suppressing unfavorable information or comment about him by later writers rather than for the legitimate protection of their proprietary interest in his intellectual product. Concern about this kind of misuse of the copyright laws was expressed by the concurring judges in Rosemont Enterprises, Inc. v. Random House, Inc., supra, who noted:

' . . . it has never been the purpose of the copyright laws to restrict dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity.' 366 F.2d at 311.

While not an important factor in the decision here, the potential for misuse of the copyright laws with respect to letters of historical figures is an additional reason for construing the fair use doctrine liberally in cases like this one." (A. 682-83)

The plaintiffs' parents maintained their innocence to their death. Those protestations permeated their letters and, as the plaintiffs themselves admitted,

"Our parents came to realize that their correspondence would be utilized as aids in the campaign to save them."*

*We Are Your Sons, p. xii (Houghton-Mifflin 1975)

On the day this action was instituted, the New York Times printed on its opinion page an article analyzing the original trial on the occasion of the twentieth anniversary of the Rosenbergs' execution. The article quotes some of the material allegedly infringed upon herein and concluded:

"the real Rosenberg case cannot yet be relinquished by the historians to the artists. For the Rosenbergs themselves - by their insistence on their innocence - irreversibly set the terms for all future consideration of their case." (Affidavit of Louis Nizer, sworn to June 26, 1973, ¶3) (Record on Appeal #15)

Others have written about this famous case and concluded that the Rosenbergs were innocent. In so doing, they quoted from many of the same letters involved herein.* That use was never challenged. Mr. Nizer read the same materials and concluded that there was sufficient evidence to support the guilty verdict (p. 486). Plaintiffs now are attempting to use the copyright laws to suppress that unfavorable conclusion and to choke off the defendants' constitutional right to express it. In cases such as this, the First Amendment requires that the plaintiffs' rights to any copyright protection must yield to the defendants' right to speak on a controversial issue. That accommodation can only be achieved through a liberal application of the fair use defense.

*See, Walter and Miriam Schneir, Invitation To An Inquest, chapter 19 (p. 213 et seq.); John Wexley, The Judgment of Julius and Ethel Rosenberg (e.g., pp. 195, 233).

Point II

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE CLAIMS FOR LIBEL AND INVASION OF PRIVACY

Judge Tyler granted summary judgment dismissing the second count for libel and invasion of the right of privacy. He considered the claims on the basis of New York law. Plaintiffs did not contend that any other law should apply. Plaintiffs now suggest (Brief, p. 79) that the laws of New York, Massachusetts or Connecticut may apply to these claims but refuse to designate a choice of law. It is clear, however, that Judge Tyler was correct in applying New York law to this count*.

However, it makes no difference what law is applied to the second count. Defendants' book, taken as a whole or dissected into as many individual statements as possible, as a matter of law contains nothing which libels plaintiffs or invades their privacy.

*This action was instituted by plaintiffs in New York, the place of first publication, against two New York residents. Practically all of the writing and all of the editorial work, even as to Fawcett, occurred within New York. (505 F.2d at 237) This Court has held that "the nexus of the action was New York both with respect to the parties and potential witnesses and documents" (Id. at 237). Plaintiffs' claim that Connecticut law should also be considered is absurd. Apart from the fact that Fawcett has an office in Greenwich, Connecticut, that state has absolutely no contact with this case.

1. The Passages in The Implosion Conspiracy About Which Plaintiffs Complain Are Not Defamatory.

Of the 77 pages or passages specified by plaintiffs as allegedly being libelous (A. 119-20), 48 do not refer to them at all. Twenty-five of the remaining 29 passages are either innocuous or complimentary (A. 120). Words are either actionable or not actionable. Not everything said about an individual will sustain a suit for libel. As stated in Prosser on Torts, p. 747, (4th ed.):

"No artificial and unreasonable construction placed upon innocent words by the evil-minded can add a defamatory meaning not fairly to be found in the light of the circumstances."

It is generally understood that the basis of an action for defamation is injury to reputation. Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99 (1933); Lyman v. New England Newspaper Publishing Co., 286 Mass. 258, 190 N.E. 542 (1934). It is inconceivable that anything stated about the plaintiffs in these 25 passages could have adversely affected their reputation. Moreover, the Courts of both New York and Massachusetts have uniformly held that mere injury to feelings alone cannot form the basis for a libel action. Mencher v. Chesley, 297 N.Y. 94, 100 (1947); Conway v. Oliver, 269 Mass. 425, 169 N.E. 491 (1929).

The remaining 3 passages (appearing on four pages) complained of by plaintiffs are quoted in full in the appendix (A. 121-22). They all deal with the emotional state of plaintiffs as children. These are the only remarks which the plaintiffs could even remotely consider unfavorable, although they are clearly not actionable. As a matter of law, it is not libelous to have called a child "neurotic", particularly when the child is now an adult and it is made clear that he is now completely well. As defendants stated concerning the plaintiffs as adults:

"Over the years they grew up to be fine young men. They graduated from college. Each became successful in his chosen enterprise. Both married and have children. They are normal, decent citizens living a happy life with affectionate relationships with their new parents and friends." (The Implosion Conspiracy at p. 492)

As Messrs. Phelps and Hamilton stated in Libel, Rights, Risks, Responsibilities (MacMillan 1966), (at pp. 54-55):

"Statements that a person is suffering a nervous breakdown, or a psychological upset, or needs psychiatric treatment or is undergoing psychoanalysis would not be considered libelous by most modern courts since these do not necessarily imply abnormality or a depth of mental illness severe enough to result in a loss of social relationships."

This is especially true where, as here, the statement or description in question is in the past tense. Thus, as the authors go on to state:

"The tense of an article is important: if the present tense is used, there is danger, because the implication is that the person should be shunned and avoided; if the past tense is used and the story makes it clear that the disease has been cured, there is almost no risk." (emphasis added)

Their view has been long supported by cases in both New York and Massachusetts. Thus, in Pike v. Van Wormer, 5 How. Pr. 171, 176 (1850) the Court dismissed a claim for libel based on the statement that plaintiff "at some former period, had the pox," holding:

"It was all used in the past tense and none of it imputed that the plaintiff was, at the present time, afflicted with that disease...the demurrer is well taken."

See also, Williams, v. Hudderdige, 22 Barb. 396 (1854). The law is the same in Massachusetts. See, Golderman v. Stearns, 7 Gray 181.

Applying this law to the facts herein, Judge Tyler found that the defendants' book was not defamatory (A. 194). This finding is not challenged in plaintiffs' brief.

2. The Allegedly Libelous Statements Are True

Even assuming that it is libelous to say that

someone was neurotic as a child, the record clearly indicates that those statements were true. (See, p. 17 supra). Judge Tyler's finding that "the statements were [not] false..." (A. 194) is not even challenged on this appeal. Consequently, the dismissal of plaintiffs' claim for libel was entirely proper.

Judge Tyler's alternative for dismissing count II, constitutional privilege, is discussed in Point III.

3. The Complaint Fails to State a Claim
for Invasion of Privacy

It is well established that New York does not recognize a common law right of privacy. Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902); Flores v. Mosler Safe Co., 7 N.Y.2d 276 (1959). All claims must meet the statutory requirements of Section 51 of the New York Civil Rights law. Hill v. Hayes, 18 App. Div. 2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963). Section 51 provides that the use of a plaintiff's name must be for "advertising purposes or for purposes of trade."

When the plaintiff claims his name was used in a publication which concerns a matter of public interest, three specific requirements must all be met in order to satisfy the "purposes of trade" requirement of Section 51:

(1) A plaintiff must prove by clear and convincing evidence that the statements were published with knowledge of falsity or reckless disregard for the truth. Time, Inc. v. Hill, 385 U.S. 374 (1967); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124 at 127 (1967); Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 294 N.Y.S.2d 122, (Sup. Ct. N.Y.Co. 1968), aff'd 32 App. Div. 2d 892 (1st Dep't 1969); Costlow v. Cusimano, 34 App. Div. 2d 196, 311 N.Y.S.2d 192, (4th Dep't 1970). Since in Time, Inc. v. Hill, supra, the Supreme Court held there was no distinction between a constitutionally protected libel and an invasion of privacy, the plaintiffs' total failure of proof in this regard is discussed in detail in Point III.

(2) A plaintiff must prove that the account in which the statements appear is infected with material and substantial falsification. As the New York Court of Appeals said in Spahn, supra at 127 with respect to matters of public interest:

"[I]t must be shown, in addition to the other requirements of the statute, that the presentation is infected with material and substantial falsification...."

See also, Koussevitzky v. Allen, Towne & Heath, Inc., 188 Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct. N.Y. Co.), aff'd, 272 App. Div. 759, 69 N.Y.S.2d 432 (st Dep't 1947).

Defendant's book is essentially an account of the "trial and post-conviction proceedings of the Rosenberg case" (A. 98). Quite aside from the critical acclaim it has enjoyed, (See e.g. A. 523-25), three district court judges in four separate reported opinions have held it to be a serious, scholarly, historical and factual account (See e.g. A. 106-07, 200,666; Gardner v. Nizer, 391 F. Supp 940 (Judge Bonsal applying fair use). This Court has quoted this language with approval (505 F.2d at 237). Even assuming arguendo that the book contains factual inaccuracies or even fictionalization, as the Koussevitzky court noted:

"That it may contain untrue statements does not transform it into a class of fiction... Truth or falsity does not, of itself, determine whether a publication comes within the ban of sections 50 and 51." 188 Misc. at 484, 68 N.Y.S.2d at 783.

The degree of fictionalization or inaccuracy charged by plaintiffs does not, as a matter of law, meet the material and substantial falsification requirement of section 51.

(3) A plaintiff must prove that the use of his name in the account was material and substantial and not incidental. University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp., 22 App. Div. 2d 452, 256 N.Y.S.2d 301 (1st Dep't. 1965), aff'd, 15 N.Y.2d 940 (1965). In that

case, the Appellate Division reversed a judgment in favor of Father Hesburgh for invasion of privacy, even though as Judge Burke's dissent in the Court of Appeals pointed out, the character of Father Hesburgh "occupies an entire chapter" of the book (15 N.Y.2d at 949). Nevertheless the Appellate Division held:

"In our opinion these isolated references are of that fleeting and incidental nature which the Civil Rights Law does not find offensive (Stillman v. Paramount Pictures Corp., 5 N.Y.2d 994, 184 N.Y.S.2d 856, 157 N.E.2d 728; Damron v. Doubleday, Doran & Co., Inc., 133 Misc. 302, 231 N.Y.S. 444, aff'd 226 App. Div. 796, 334 N.Y.S. 773; Mogoen v. Varsity Pajamas, Inc., 13 A.D. 2d 114, 213 N.Y.S.2d 999)." 22 App. Div. 2d at 454, N.Y.S.2d at 304.

Similarly, as Judge Tyler held in this case: "29 isolated references of a fleeting and peripheral nature are insufficient to support a claim by plaintiffs under §51" (A. 199).

A failure on any one of these requirements is sufficient to defeat a claim under section 51; plaintiffs failed on all three. In addition to plaintiffs' failure with respect to these requirements, the District Court also correctly held that no action for section 51 lies because plaintiffs' names were not used within the meaning of the New York statute (A. 198).

In University of Notre Dame v. Twentieth Century-Fox Film Corp., 22 App. Div. 2d 452, 256 N.Y.S.2d 301 (1st Dep't.), aff'd, 15 N.Y.2d 940 (1965), the Court held:

"To the extent that Father Hesburgh's cause of action is based on the film, it fails for the additional reason that the film does not use his 'name, portrait or picture', the statutory test of identification (Toscani v. Hersey, 271 App. Div. 445, 448, 65 N.Y.S.2d 814, 817). We do not think this test is satisfied by the conjunction of the fact that the book names him and the fact that the cover pages of the paperback edition, which in no way refer to him or his co-plaintiff, laud the film". (22 App. Div. 2d at 455)

Similarly, in Waters v. Moore, 70 Misc. 2d 372, 334 N.Y.S.2d 428 (Sup. Ct. Nass. Co. 1972), the plaintiff alleged that his right of privacy had been infringed by a fictionalized account of an event in which he participated portrayed in the motion picture, THE FRENCH CONNECTION. The identification was claimed to be based upon the use of his name in the book (credits for the picture stated it was based on the book) and by the performance of an actor whose "appearance resemble[d]" plaintiff. 70 Misc. 2d at 374. The Court nevertheless, relying on the above authority, dismissed the complaint as being without the statute, holding:

"Neither is the test whether an individual's identity can be ascertained from his involvement with the actual event or by reference to external sources." 70 Misc. 2d at 375, 334 N.Y.S. 2d at 433

To the same effect, see, Bernstein v. N.B.C., 129 F. Supp 817 (D.D.C. 1955), aff'd, 232 F.2d 369 (D.C. Cir. 1956); Miller v. N.B.C., 157 F. Supp. 240 (D. Del. 1957); Levey v. Warner Bros. Pictures, 57 F. Supp. 40 (S.D.N.Y. 1945); Pfaulder v. Pfaulder Co., 114 Misc. 477, 187 N.Y.S. 725 (Sup. Ct. Monroe Co. 1920).

Plaintiffs assertion that the statute only requires plaintiffs to be "recognizable" (Br., pp. 103-04) is not supported by the authority cited. In Negri v. Schering Corporation, 333 F. Supp. 101 (S.D.N.Y. 1971), the picture of the plaintiff, a famous movie star, was used in defendant's advertisement, thereby satisfying the statute. In Toscani v. Hersey, 271 App. Div. 445, 65 N.Y.S.2d 814 (1st Dep't. 1946), the court held that the absence of plaintiff's true name was fatal to his claim regardless of the admitted fact that plaintiff was recognizable and known by many people as the person who held the described office.

Similarly, plaintiffs' attempt to avoid dismissal by claiming that they were identifiable through the use in The Implosion Conspiracy through their former surname, Rosenberg (Br. p. 102), is frivolous. As Judge Tyler observed, in rejecting that very argument:

"Ironically, plaintiffs' counsel states in his affidavit that plaintiffs 'assumed the name of their adoptive parents and remained

incognito through the years', hiding their identity except to a limited number of persons who had been involved in the parents' struggle. In sum, plaintiffs attempt to carry water on both shoulders by saying that The Implosion Conspiracy invaded their privacy by causing them to come into public scrutiny, but at the same time claiming they were identifiable as Michael and Robert Rosenberg all along. This they cannot do. The fact remains that their present legal name, which they have been using for twenty years and continue to use, does not appear in the book. This fact renders any possible claim for invasion of privacy under §51 fatally defective. It is the plaintiffs who have identified themselves to the public, not the defendants." (A. 198-99) (emphasis added)*

Finally, although not relied upon by Judge Tyler, there is another consideration bearing on the plaintiffs' claims. The substance of the passages about which plaintiffs complain most bitterly has been reported before by other authors without any objection by plaintiffs.

*The very same logic refutes appellants' attempted comparison (Br. p. 120) with other famous people who have changed their names. Thus, the public has always known that Muhammed Ali and Cassius Clay or Kareem Abdul Jabar and Lew Alcindor were the same person. (Nor, in light of the decisions set forth on page 50 supra, would even that identification satisfy the statute.) In the present case, however, until plaintiffs themselves chose to reveal the fact, the general public did not know that Michael and Robert Rosenberg were Michael and Robert Meeropol. (A. 133, 133)

For example, the details of plaintiffs' last visit with parents (Br. pp. 92-93) are also described at pp. 17 and 264 of Jonathan Root's The Betrayers. Similarly, the story as to how Michael Meeropol heard the news of his parents' impending execution while watching a baseball game (Br. p. 17) was described on page 24 of The Betrayers and page 125 of The Rosenberg Story by Virginia Gardner. (See also. A. 135). Thus, defendants can hardly be accused of revealing any "personal" or "intimate" events in plaintiffs' lives which have not been published before.

4. Massachusetts Does Not Recognize a Cause of Action for Invasion of Privacy

We note parenthetically that the only other state whose law is even arguably applicable is Massachusetts, the apparent domicile of plaintiffs. In Massachusetts, as plaintiffs have virtually conceded (Br. p. 98, n. 104), no Court has ever recognized a cause of action or permitted recovery for invasion of privacy. As the Court stated in Lahr. v. Adell Chemical Co., 300 F.2d 256, 258 (1st Cir. 1952):

"We deal first with the right of privacy. The Massachusetts court has avoided recognizing such a right. Kelly v. Post Publishing Co., 1951, 327 Mass. 275, 98 N.E. 2d 286; Themo v. New England Newspaper Pub. Co., 1940, 306 Mass. 54, 27 N.E. 2d 753."

See also, Frick v. Boyd, 350 Mass. 259, 214 N.E. 2d 460 (1966).

It is therefore apparent that plaintiffs did not make out a claim for libel or invasion of privacy. As set forth in Point III, even if plaintiffs had been able to do so, the defendants' conduct was privileged.

Point III

IN ADDITION, THE SECOND COUNT OF THE COMPLAINT WAS PROPERLY DISMISSED BECAUSE ANY STATEMENTS ABOUT PLAINTIFFS ARE CONSTITUTIONALLY PRIVILEGED

Even if all of the statements were false and could be held to be libelous or amounted to an invasion of plaintiffs' privacy, Judge Tyler was nevertheless correct in dismissing the second count because the statements concerned public figures and were not published with actual malice.

Public Figures

The "public figure" doctrine was recently reaffirmed by the Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974), a case carefully considered by the district court below in its determination that plaintiffs were "public figures" (A. 188-91). In defining the class of plaintiffs whose claims are limited by The New York Times rule, the Supreme Court in Gertz held that designation as a public figure:

"...may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." 418 U.S. at 351 (emphasis added)

Plaintiffs qualify as public figures under either of the alternatives. As Judge Tyler found:

"As children of the Rosenbergs, the plaintiffs spent much of their early years in the public spotlight. The activities of their parents were monitored by book, magazine and newspapers throughout the world. As children of famous parents, they achieved general fame or notoriety in the community." (A. 189-90) (emphasis added)

The Rosenberg case received worldwide public attention and continues to this day to be a matter of public concern, touching as it does on issues ranging the gamut from Russian-American relations to capital punishment. Plaintiffs' naked assertion (Br. p. 74) that their names were not household words during this period simply cannot be made in good faith. During the Rosenbergs' final weeks on death row, as the public debate over the merits and morality of capital punishment raged, plaintiffs, as children of the Rosenbergs, were an integral part of this debate and most certainly experienced "general fame and notoriety" (Gertz, supra at 352).

Indeed, plaintiffs themselves were at the very least "drawn into" the campaign to save their parents. For example, plaintiffs admittedly attended public rallies on behalf of their parents and Michael Meeropol wrote a public letter to President Eisenhower requesting executive clemency and personally delivered it to the White House (See Brief, p. 73, fn; A. 138; the staged photographs numbered 16 and 21 between pages 352 and 353 of The Implosion Conspiracy and p. 222 and photographs contained in We Are Your Sons [A. 526])). Their activities during this time and the influence which they had upon their parents' actions and the entire capital punishment issue were necessary ingredients in the attempt to present a complete history of the Rosenberg case. Even if plaintiffs could somehow argue that they did not achieve "general fame or notoriety", they were certainly "drawn into a public controversy" so as to establish them as public figures. Gertz, 418 U.S. at 351.

Moreover, plaintiffs remain public figures to this day*. They are actively involved with the National Committee to Re-Open the Rosenberg case; they give interviews to the press and have been featured at public rallies (We Are Your Sons, Dust Cover (Houghton-Mifflin, 1975); A. 139; New York Post, June 18, 1974). Indeed, as authors of their own book,

*They were also the subject of a highly publicized custody proceeding after their parents' death. (The Implosion Conspiracy, pp. 491-92).

We Are Your Sons about this matter, plaintiffs are public figures for this purpose. [See Hotchner v. Castillo-Puche, 404 F. Supp. 1041 (S.D.N.Y. 1976)]. Thus, even under Gertz's "voluntary" basis of determining a public figure, plaintiffs qualify.

In holding that plaintiffs are public figures, Judge Tyler recognized that plaintiffs have unlimited access to effective channels of public communications (A. 190). Accordingly, their status as public figures today can hardly be disputed when their mere "coming out" is reported in 95 newspapers throughout the United States (see Exhibits 2-96 annexed to the affidavit of George Berger, sworn to October 9, 1974 and A. 133). As Judge Tyler observed, quoting Gertz:

"The first remedy of any victim of defamation is self-help -- using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury and the state interest in protecting them is correspondingly greater." (A. 190, quoting Gertz, supra at 344)

* * *

"Plaintiffs have not, and, indeed, cannot argue that they do not have access to the channels of effective communication." (A. 190)

Plaintiffs go on at great length in discussing the facts in Gertz and Time, Inc. v. Firestone, 424 U.S. 448 (1976) (Br. pp. 70-76). Suffice it to say that there simply is no comparison between statements concerning the Chicago attorney involved in a private civil litigation (Gertz) and the wife of a socially prominent individual involved in a civil divorce case (Firestone) with a discussion of the trial of the "atomic spies", Julius and Ethel Rosenberg.*

Indeed, plaintiffs seemingly argue that relatives of public persons will never qualify as public figures. (Br. p. 76).

*Without attempting to belabor the obvious, the following are examples of cases which have held individuals to be "public figures." None of these individuals received the media attention experienced by plaintiffs and certainly the import of their public controversy was not remotely as significant as the one involving plaintiffs. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1968) (college coach and athletic director); Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970) (urban real estate developer who was negotiating with city officials to obtain zoning variances; Walker v. Pulitzer Publishing Co., 394 F.2d 800 (8th Cir. 1968) (retired army general); Dacey v. Florida Bar, Inc., 427 F.2d 1292 (5th Cir. 1970) (author of best-selling book relating to methods of avoiding probate); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) (former professional basketball player who had retired 12 years before allegedly slanderous statement); Lloyds v. United Press International, Inc., 63 Misc.2d 421, 311 N.Y.S.2d 373 (Sup. Ct. N.Y. Co. 1970) (trainer-driver of standard bred horses); Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968), cert. denied, 393 U.S. 840 (1968) (public figures included "anyone who is famous or infamous because of who he is or what he has done." (Id. at 418); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), cert. denied, 392 U.S. 922 (1969) (underworld figures); Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), cert. denied, 388 U.S. 909 (1967) (a professor); Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (2d Dep't 1964), aff'd, 15 N.Y.2d 1023 (1965) (the law partner of a mayor of a city);

(cont. on next page)

However, they ignore the only Federal Court of Appeals decision since Gertz which is directly on point. In Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976), the Seventh Circuit stated:

"The other plaintiff, Johanna Holland, subsequent to the filing of this action was married to [Johnny] Carson. The record contains copies of many media articles relating to Carson's former wife. From these, one can assume that a wife of a public figure such as Carson more or less automatically becomes at least a part-time public figure herself.

The district court found that both Mr. Carson and Miss Holland fall readily within the term 'public figure'." (Id. at 210)

The cases which plaintiffs cite as authority for the premise that relatives of public figures are not public figures themselves (Br. p. 76 Corbett v. Register Publishing Co., 33 Conn. Sup. 4 [1975], the wife and son of a local youth officer; and Troonan v. Wood, 62 Ill.2d 184 [1976] the mother of a gang member) stand only upon their own particular facts which are hardly analogous to facts involving

(Cont. from previous page)

Hotchner v. Castillo-Puche, supra (author of book about Ernest Hemingway); Herbert v. Landau, F.Supp. , 2 BNA Med. L. Rept. 1257 (S.D.N.Y. 1977) (retired Army Colonel involved in Vietnam war crimes investigation).

the sons of Julius and Ethel Rosenberg. In this regard, the Note, Analysis of Distinction between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons, 49 So.Cal.L.Rev. 1131 (1976), cited by plaintiffs. (Br. pp. 71, 75), itself describes the district court's classification of plaintiffs as public figures as "correct" (Id. at 1240)*.

Finally, plaintiffs state that the "weight of authority clearly suggests" (Br. pp. 77-78) that the determination of who is a public figure is for the jury and not the court. Aside from the fact that there is no jury as to Nizer and Doubleday, clearly, as with the question of any privilege, the determination in the first instance is always for the court. Notwithstanding plaintiffs'

*Plaintiffs' assertion at page 72 of their brief, in juxtaposition with the quote from Firestone, that even the Rosenbergs themselves were "involuntarily" drawn into a judicial proceeding is both a distortion and patently absurd. Obviously, "voluntary" refers to the individual's actions in performing the act and not "voluntary" in the sense of becoming a "public figure" for purposes of a libel or invasion of privacy action. Thus, for example, a twelve-year old plaintiff in Jones v. Gates-Chili News, Inc., 78 Misc.2d 837, 358, 358 N.Y.S.2d 649 (Sup. Ct. Monroe Co. 1974) who committed an alleged crime for which he was never prosecuted, was held to be a public figure. Under plaintiffs' definition, anyone who does not desire publicity but still is involved with public matters, would never qualify as a "public figure". Would plaintiffs seriously argue, for example, that either Amy Carter or Caroline Kennedy is not a public figure because their relationships with their respective prominent relatives were established before their prominence and without their consent?

assertion that there is "no present decision binding upon the court" (Br. p. 70), the Supreme Court in Rosenblatt v. Baer, 383 U.S. 75, 88 (1966) instructed the trial court upon retrial "that, as in the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proof shows [plaintiff] to be a 'public official'." See also, Hotchner v. Castillo-Puche, *supra*; Cheatum v. Wehle, 5 N.Y.2d 585, 594 (1959); Duffy v. Kipers, 26 App. Div. 2d 127, 271 N.Y.S.2d 338 (4th Dep't 1963).

As a matter of law the district court was correct in its determination that plaintiffs were public figures for purposes of this action and plaintiffs' arguments to the contrary are specious.

Actual Malice

Under the New York Times standard the burden is on public figures to prove by clear and convincing evidence that the defendants knew that their published statements were untrue or that they published in reckless disregard of whether these statements were true or false (i.e., a

high degree of awareness of their probable falsity). See, New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974). The same standard applies to actions for invasion of privacy. Time, Inc. v. Hill, 385 U.S. 374 (1967).

Initially, and perhaps most significantly, Gertz requires that the allegedly libelous statements "make substantial danger to reputation apparent." Liability may not be imposed as long as the content of the statement "did not warn a reasonably prudent editor or broadcaster of its defamatory potential." (418 U.S. at 348). None of the statements concerning plaintiffs make "substantial danger to [their] reputation apparent", particularly in view of the last statement in the book which says that plaintiffs grew up to be "fine young men" (see supra at p. 43). For this reason alone, the statements about the plaintiffs are constitutionally protected.

The New York Times test is one which equates "reckless disregard of the truth with subjective awareness of probable falsity" (Gertz, supra, at 323, 334-35, n. 6) and the standard "refers to the defendant's attitude towards the truth or falsity of the material published" (Carson v. Allied News Co., supra, 529 F.2d at 214). "There must be sufficient evidence to permit the conclusion that the defendant in

fact entertained serious doubts as to the truth of his publication" Gertz, supra, 418 U.S. at 335, n. 6 (quoting St. Amant v. Thompson, 390 U.S. 727 at 731 [1968])*.

Moreover, and irrespective of the fact that danger to reputation was not apparent, the record in this case is so overwhelming that defendants could not possibly prove actual malice. As Judge Tyler expressly found, "The Implosion Conspiracy, as indicated by its contents and the affidavits of the author and the publisher, was the product of considerable research and care." (A. 192)

In paragraph 14 of his affidavit and Exhibits B-J annexed thereto (A. 125-129; 140-148; 192) defendant Nizer sets forth the bases of his comments concerning the plaintiffs (A. 124-25; 132-37) (See p. 10-11, 17, supra). The Nizer affidavit and these exhibits document virtually every word contained in the passages claimed by plaintiffs to be libelous and invasive of their privacy**. Accordingly,

*In St. Amant, the statement complained of implied criminal conduct on the part of the plaintiff. The Supreme Court specifically held that there was no obligation on the publisher to check this statement or verify the facts, even though the potential defamatory nature of the statement was readily apparent, as long as the publisher did not "entertain serious doubts about the truth of the statement." 390 U.S. at 731.

**In addition to the sworn testimony of the plaintiffs' father, defendants relied upon the descriptions of the plaintiffs' neurotic behavior contain in The Betrayers by Jonathon Root (pp. 78, 80, 108 and 229) and The Judgment of Julius and Ethel Rosenberg by John Wexley (pp. 124, 130, 142 and 198) (See A. 126-29).

Judge Tyler correctly held that "there could be no serious doubt concerning the truth of any statement in the [book] and certainly no reckless disregard of whether statements in the book were false" (A. 193) (See p. 10-11, 17, supra; A. 520-21)

In addition, as to the publishing defendants Doubleday and Fawcett, it was established without contradiction that Doubleday had published Mr. Nizer before and was well acquainted with the research that went into his writing (A. 150). Before the publication of the book (A. 150-51) it had formed a high opinion of Mr. Nizer's reliability to present facts accurately and fairly. Furthermore, both Doubleday and Fawcett remained of the opinion that Mr. Nizer's statements about the plaintiffs were true and both conducted themselves in the publication of the book according to the usual practices then and now prevailing with respect to the publication of trade books (A. 151, 172-73).

Fawcett, through its attorneys and through Doubleday's attorneys (who also represent Fawcett in the defense of this action), were intimately familiar with the factual basis of plaintiffs' claims and reached the conclusion prior to publication of the paperback that the claims were without merit. Even without such investigation, the review of Judge

Tyler's opinion denying plaintiffs' request for preliminary injunctive relief strongly indicates the lack of merit of these claims. As this Court previously stated: "the fact that Fawcett may have had prior notice of appellants' claims does not necessary legitimize them" (505 F.2d 232)

Plaintiffs' brief (see e.g. Br. 78-81) does not seriously contend that there is a question of fact with respect to their ability to prove actual malice.* The only opposition submitted to the summary judgment motion below was plaintiffs' attorney's affidavit which, as the district court stated, merely "reasserts the allegations of the complaint" (A. 193). This affidavit, especially on the record in this case, was clearly insufficient.

To the extent that plaintiffs assert that the New York Times standard is not applicable because the statements about them relate to private matters (Br. pp. 81-84 [libel] 106-08 [privacy]) they are wrong. The test for determining what

*Instead plaintiffs in their typical evasive fashion of refusing to specify what state law would apply, discuss the various state standards applicable if plaintiffs are not held to be public figures. Since plaintiffs are public figures, this discussion is totally irrelevant. However, we do submit that the record in this action would warrant summary dismissal under the New York standard. See Chapadeau v. Utica Observer, 38 N.Y.2d 196 (1975) "to warrant recovery [plaintiff], must establish by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties".

matters are so private that they cannot be revealed about public figures or which disqualify them as legitimate matters of public interest was recently set forth in Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975). The Ninth Circuit discussed the standard of newsworthiness so as to constitute a public fact as follows:

"In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern...by the extreme limits it imposes in defining the tort it avoids unduly limiting the breathing space needed by the press for the exercise of effective editorial judgment. (Id. at 1129) (emphasis added)

In the instant case Judge Tyler found:

"There are, however, no revelations [about plaintiffs] of any intimate details which would tend to outrage public tolerance. 'There is nothing repugnant to one's sense of decency or any statement that takes the book out of the realm of the legitimate dissemination of information on a subject of public interest. Koussevitzky, supra." (A. 200)

* * *

"The activities of the Rosenberg children during the trial and their inter-relationship with their parents carried on in the setting of a death row prison were necessary, albeit arguably peripheral, ingredients in the author's attempt to present a complete history of the Rosenberg trial and its aftermath. Assuming any statements in the book are actionable..., they concern matters properly within 'the ambit

of public interest and scrutiny' [citations omitted], and thus are constitutionally protected". (A. 196)

Finally, plaintiffs' brief attempts to set-up a smoke screen claiming that they were denied adequate discovery with respect to actual malice (Br. 89-92). Nothing could be further from the truth. The record establishes that before the motion for summary judgment was served, plaintiffs inspected thousands of pages of documents and the depositions of defendants Nizer and Doubleday were taken. Indeed, on one of the prior appeals this Court twice described the discovery which had occurred in the action prior to the decision dismissing Count II as "extensive" 505 F.2d at 234, 237.* As Judge Tyler stated in rejecting this same contention made upon the motion for summary judgment:

"following a year of discovery into whether defendants published the book with actual malice, plaintiffs continue to assert that they are entitled to further discovery...I disagree." (A. 194)

In conclusion, all the evidence indicates that the statements complained of are "neither false nor defamatory." From a realistic point of view, especially in view of plaintiffs own admissions and the testimony of their own father (A. 125-29, 140-48), there is no way

*This Court's decision was rendered shortly after the dismissal of Count II.

that plaintiffs could prove otherwise. At the very least, these statements could not, as a matter of law, have been published with the high degree of awareness of probable falsity which would permit a plaintiff to recover in a public figure libel or invasion of privacy action, according to the standards espoused by the United States Supreme Court. As Judge Tyler held:

"The record as a whole, thus, establishes that there was no knowledge of falsity (if indeed, there is a falsity), no serious doubts concerning the truth of any statement in the article and certainly no reckless disregard of whether statements in the book were false...[I]t is clear from the record, consisting of extensive interrogatories, depositions and affidavits, that plaintiffs cannot show that the book was published with actual malice."
(A. 193-94)

Point IV

COUNT III FAILS TO STATE A CLAIM
FOR WHICH RELIEF CAN BE GRANTED

Although it is described by plaintiffs (Br. p. 5) as a claim for damage to their "common law copyright" and "literary property" in their parents' letters, it is clear that Count III fails to state such a claim. Plaintiffs do not deny that defendants have never copied any of these unpublished letters (A. 210), and without a copying, a claim for infringement of common law copyright or damage to literary property cannot exist. Estate of Hemingway v. Random House, Inc., 53 Misc. 2d 462, 279 N.Y.S.2d 51, 58-59 (Sup. Ct. N.Y. Co.), aff'd, 29 App. Div. 2d 633 (1st Dep't 1967), aff'd, 23 N.Y.2d 341 (1968); Heywood v. Jericho Co., 193 Misc. 905, 85 N.Y.S.2d 464 (Sup. Ct. N.Y. Co. 1948).

Based on their failure to make any argument with respect to Count III, plaintiffs apparently concede that if the dismissals of Counts I and II are affirmed so should the dismissal of Count III. However, this concession does not go far enough. Clearly, even if Counts I and/or II should be considered viable, Count III must still be dismissed since, as noted above, it does not state a claim for which relief can be granted.

CONCLUSION

For all of the foregoing reasons the judgment of the District Court should be affirmed in its entirety.

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN
KRIM & BALLON

Attorneys for Defendant-
Appellee, Louis Nizer
10 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:
George Berger
Martin Stein

SATTERLEE & STEPHENS

Attorneys for Defendants-
Appellees, Doubleday & Co., Inc.
and Fawcett Publications, Inc.
277 Park Avenue
New York, New York 10019
(212) 826-6200

Of Counsel:
Robert M. Callagy
James Rittinger

Service of 3 copies of the
within Brief is hereby
admitted this 3rd day of
March 19 77
Signed Philip Marshall Perlman
Attorney for Marshall Plaintiffs

